

In the matter of the complaint by Winston Challenger alleging discrimination in employment on the basis of race, color, ancestry, place of origin, ethnic origin and harassment by G.M.C. Truck Centre (A Division of General Motors Canada Ltd.), its servants and agents, and Joe Hampson, Service Manager, Martin Gallagher, General Foreman, and Bill Dehaas, Foreman.

I was appointed as a Board of Inquiry by the Hon. William Wrye, Minister of Labour, Province of Ontario, pursuant to subsection 37(1) of the Human Rights Code, 1981 to hear the above-mentioned complaint.

Board of Inquiry: W. Gunther Plaut,

Counsel for the Commission: Tom Bell,

Counsel for the Complainant: Ashley Bernardine,

Counsel for the Respondent: W. Jason M. Hanson.

A telephone conference took place on July 10, 1987, at 10 AM. The above-named counsel participated and, in addition, Ms. Valerie Lawson was also present, at the invitation of Mr. Bell.

It was agreed that the conference call constituted a preliminary hearing.

Counsel for the respondent, referring to Section 37(2) of the Ontario Human Rights Code, 1981 as amended (hereafter referred to as the Code), stated that in his opinion the cited section precluded the Chairman of the Board of Inquiry from sitting.

The cited section states:

37(2) A member of the board hearing the complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing....

Both counsel for the respondent and for the Human Rights Commission submitted that this section applied in this case, inasmuch as Mr. Challenger had filed his complaint on May 16, 1984 and that at that time I was serving

as Vice-Chairman of the Commission, and that furthermore, investigation of the complaint was begun before I left the Commission, on Feb. 18, 1985.

Neither counsel submitted that I had knowledge of the complaint or that in any wise I participated in the investigation or had knowledge thereof. They also stated that their submission did not imply personal bias on my part.

The conference was thereupon adjourned, pending submissions by counsel.

The question I needed to decide first of all was whether s. 37(2) applied in my case in the above-mentioned circumstances. The law clearly precludes a person from hearing the complaint when he/she has "taken part in any investigation or consideration of the subject-matter."

On the face of it, this was not the case. The law obviously means to prevent a person from hearing a matter when bias may be presumed or be likely, and therefore, instead of leaving that decision to the member of the board, the law sets some objective standards which preclude the member's participation.

But were there other considerations which would give rise to the belief that these standards apply here, at least by extension?

Commissioners will rarely if ever know of a complaint having been launched, and they will never participate in any fashion in the subsequent investigation. I certainly was ignorant of the complaint and still am at this point, not having seen it and knowing no circumstances surrounding it, and counsel did not claim that I had such knowledge.

However, should one consider the human rights officer investigating the complaint as an agent of the Commissioners, regardless of their personal knowledge? Questions of agency and responsibility arise frequently with respondents when their knowledge or responsibility is at issue; should these same considerations apply also to the Commissioners?

I am inclined to think otherwise, especially since the Ontario Human Rights Commission is so structured that technically (and in many ways practically) its officers are not accountable to the Commissioners but to their own civil service chain of supervisors.

If s. 37(2) is not applicable to my status on these grounds, may a reasonable apprehension of "institutional bias" be claimed, inasmuch as the Commission

carries the complaint? I will not here deal with the jurisprudence on this matter which may or may not be applicable. Certainly, as counsel agreed, my past membership on the Commission does not forever preclude me from serving as a board of inquiry. Though respondents are frequently under the impression that the Commission is biased toward the complainant, I might point out that the same impression prevails on the side of complainants who cite the statistical fact that most complaints are dismissed by the Commission while only a few are forwarded to the Minister for the appointment of a board of inquiry. Commissioners are biased -- if the term may be applied here at all -- toward human rights as expressed by the Code and are appointed to uphold it and its principles.

All the above notwithstanding, in cases of reasonably perceived bias the letter of the law alone is not applicable. Bias is in part the state of mind of the member who hears the complaint, and in part also the perception of those appearing before him/her. Inasmuch as both counsel for the respondents and the Commission submitted that s. 37(2) applied to me they both in effect claimed "institutional bias." While counsel will understand the considerations I laid out above, others may simply believe that s. 37(2) "clearly" applies and that, were I to continue sitting as a board, would do so in contravention of the law. I might have ruled that the law's intent and language do not apply to this case and invited counsel to apply for judicial review of my ruling. I have chosen not to do so, in part because the issue of my serving as a board is not of fundamental character and, more importantly, because I do not wish to delay a long pending case even further because of it.

Therefore, I have decided to withdraw from hearing the case and ask the Minister to appoint a new board of inquiry.

Toronto, 16 July 1987



Chairman

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